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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 377

VILLAGE OF BROWN DEER,
a Municipal Corporation,

Petitioner,

vs.

CITY OF MILWAUKEE, a Municipal Corporation; STANLEY J. WITKOWSKI, City Clerk of the City of Milwaukee, TOWN OF GRANVILLE a body corporate; and JOSEPH F. SHAUGHNESSY, Clerk of the Town of Granville;

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

The Village of Brown Deer, a municipal corporation, prays that a writ of certiorari issue to review a judgment of the Circuit Court for Milwaukee County, Wisconsin, as amended and modified to conform with the decision and mandate of the Supreme Court of the State of Wisconsin, holding that annexation proceedings were invalid because essential corporate signatures to annexation petitions were found not to have been properly authorized.

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported in Volume 16 Wis. (2d) at Page 206, 114 N.W. (2d) 493.*

JURISDICTION

The judgment sought to be reviewed was entered on June 15, 1962, in the form of an amended judgment to conform to the mandate of the Wisconsin Supreme Court, issued June 11, 1962.

Rehearing of the Wisconsin Supreme Court's Decision was denied on June 5, 1962. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257 (C. 646, 62 Stat. 926) and 28 U.S.C. Sec. 2101 (C. 646, 62 Stat. 961; C. 139 Sec. 106, 63 Stat. 104).

QUESTION PRESENTED

Where a state statute gives the right to owners of taxable real estate to petition for the annexation of their property to a municipality (such right being thereby constituted an incident to such ownership of real estate) and the state supreme court arbitrarily and unreasonably imposes a more stringent and burdensome standard or test of validity upon corporate signers of such annexation petitions than it imposes on other corporations acting in the usual and ordinary course of business, with the result that the subject signatures are held to be invalid and the annexation proceedings, by reason thereof, fail, — does such discriminatory action constitute a deprivation of property without due process of law, and a denial of the

*Full text of the opinion is printed as "Appendix A" to this Petition.

equal protection of the laws as to (a) the corporate signers whose signatures were asserted to be invalid; and (b) as to all other persons who were entitled to the joinder of the corporations in order to meet the percentage of owners needed to sustain an annexation proceeding?

CONSTITUTIONAL PROVISION INVOLVED

The pertinent portion of the United States Constitution involved herein is the following quoted portion of Section 1, Amendment XIV:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The basic facts material to the question presented by this petition are undisputed. They are set forth in the Wisconsin Supreme Court's opinion, which is appended to this petition as "Appendix A". Reference to record pages is accordingly deemed unnecessary by reason of the nature of the statement of the case:

Prior to the annexation and consolidation proceedings involved herein, the Town of Granville was an unincorporated area located in Milwaukee County, Wisconsin, contiguous to both the City of Milwaukee and to the petitioner Village of Brown Deer.

The legislature of Wisconsin has prescribed separate and distinct methods for municipalities to consolidate or to annex territory. In certain circumstances, the present situation being one, consolidation and annexation proceedings may be undertaken simultaneously by two com-

peting municipalities to acquire municipal jurisdiction over the same land areas. If statutory requirements for annexation are met, such proceedings take precedence over consolidation. In the present situation, if, as we contend, the annexation proceedings are valid, the attempted consolidation of the same territory by Milwaukee is a nullity. And conversely, if the annexation is in law and fact invalid, the consolidation with Milwaukee is effective.

Petitioner, Village of Brown Deer, undertook in 1956 to annex five land areas located in the Town of Granville. These areas were known respectively as the Corrigan, Brown Deer Park, Laun, Johnson and Tripoli Golf Club annexations. Section 62.07(1) W[illegible]. Rev. Stats. 1955 required the filing of a petition for annexation by "a majority of the electors and the *owners of one half of the real estate in assessed value*" in the territory to be annexed. (Emphasis ours). In three of the subject areas, corporations were owners of substantial "real estate in assessed value". The assessed value of the real estate owned by the signatories to the annexation petitions was in excess of, but so close to the statutory requisite of "one-half", that the validity of the subject proceedings hinged upon the validity of the corporate signings of the annexation petitions. If, as held by the Wisconsin Supreme Court, the corporate signatures of Evert Container Corporation, Manufacturer's Products, Inc., and Good Hope Investment Company were not valid, there would be insufficient signers of the petition with respect to owners of one-half of the real estate in assessed value, and the annexations dependent upon those petitions would fail. But if, as we contend, such signatures were valid, the annexation proceedings dependent thereon w[illegible]ld be valid

and would supersede the consolidation proceedings with the City of Milwaukee.

The right of the corporations in question to sign a petition for annexation is expressly conferred by statute (Sec. 62.07(1) Wis. Rev. Stats. 1955) upon all owners of taxable property alike without classification or discrimination. It is an incident of ownership of taxable real estate. The right thus conferred is a substantial and valuable right, and one which the owners are entitled to exercise without unconstitutional discrimination worked against them. And because of the statutory requirement of a specified percentage (fifty per cent.) of such owners to validly sustain an annexation proceeding, all of the other signers of such a petition who favor annexation are entitled to the joinder and support of all like-minded individuals and corporations in such annexation petitions.

Petitioner here claims that the invalidation of the corporate signatures to the annexation petitions in the Corrigan, Johnson, and Brown Deer Park annexations were the result of arbitrary, unreasonable and discriminatory action by the majority of the Supreme Court of the State of Wisconsin, and that such invalidation has worked a deprivation of property without due process of law and a denial of the equal protection of the law against all the signers of said petitions.

The constitutional infringement was accomplished in this manner: The Wisconsin Supreme Court, in a divided opinion (4 to 2, with one associate justice not taking part) held that notwithstanding the president of the corporation who signed the petition for the Corrigan annexation on behalf of the corporation owned 51% of the stock of the corporation; and had been accustomed to resolving the problems of the corporation as a sole owner; and that the board of directors met infrequently; and

that the corporation subsequently ratified his act, the corporate signature was nevertheless invalid.*

The general rule stated in 2 Fletcher, Cyc. Corps. Sec. 553 is to the effect that the powers of a president of a corporation include, among others, the apparent powers which the corporation permits him to exercise without objection. These include all the powers of the board of directors where they abandon the management of the corporation to him. This is particularly true of a so-called "one-man" corporation where he is the president and dominates, manages and controls its property and affairs as his own.

Wisconsin follows the rule that corporate officers are conclusively presumed to have complied with all limits upon powers of officers of the corporation, or the corporation is deemed to have waived compliance with such limits, where justice so requires. *St. Clair v. Rutledge,* 115 Wis. 583, 92 N.W. 234 (1902). This case has not been overruled by the Wisconsin Supreme Court. In fact, the opinion of the court in the present case reaffirms the application of this rule of apparent authority and estoppel in matters which flow in the normal course of business. But in the face of the reaffirmance of this rule, the Court held that the rule "cannot apply where the action of the directors relates to a political determination and is outside of the ordinary course of normal business operations".

The effect of this decision is to arbitrarily, unreasonably and discriminatorily invalidate the corporate signatures of these business corporations in their dealings with governmental entities, while at the same time asserting that such signatures would be held valid if executed in the course of ordinary business transactions.

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*Under similar factual situations, the corporate signatures involved in the Johnson annexation and the Brown Deer Park annexation were held invalid.

STANDING TO SUE

In opposition to a motion for stay in the present proceeding, respondent, City of Milwaukee, challenged petitioner's standing to sue. This petition is brought by petitioner as *parens patriae* for all of the persons who signed the petitions for annexation who reside in the contested areas. While these areas have been declared to be consolidated with the City of Milwaukee by virtue of the invalidation of the Brown Deer annexation proceedings, they are in law and in fact a part of Brown Deer if this court agrees with our contention that the action of the Wisconsin Supreme Court was unconstitutional in the respects set forth in this petition.

The present litigation has extended over a period of more than six years. The trial lasted approximately six months. 200 witnesses testified. It has reached the Wisconsin Supreme Court four times.* No single litigant, such as a residential property owner in the Village could afford to maintain this litigation to protect his individual property rights. There are several thousand taxpayers whose rights are involved. Their interests are identical as regards their desire to be a part of the suburban Village of Brown Deer, rather than to be a part of the City of Milwaukee. Under these circumstances the considerations for recognition of the doctrine of *parens patriae* are patently present. We suggest to the court that the *parens patriae* doctrine as set forth in *Georgia v. Pennsylvania R. R. Co.*, 324 U.S. 439, 65 S. Ct. 716, 89 Law. Ed. 1051, is applicable to the citizens of Brown Deer who, by reason of infringement of their constitutional rights as claimed in this petition, are erroneously attached to the City of Milwaukee.

**Brown Deer v. Milwaukee*, 274 Wis. 50, 79 N.W. (2d) 340; 2 Wis. (2d) 441, 86 N.W. (2d) 487; 8 Wis. (2d) 631, 99 N.W. (2d) 860; 16 Wis. (2d) 206, 114 N.W. (2d) 493.

The decisions cited by respondent challenging petitioner's standing to sue* are not in point. The constitutional rights claimed to be infringed in the present case are those of the taxpayers, and not of the municipality as a political subdivision of the State.

FEDERAL QUESTION TIMELY RAISED

For the following stated reasons, the federal question herein was timely raised, notwithstanding it was raised for the first time upon motion for rehearing in the state supreme court.

Herndon v. Georgia, 295 U.S. 441, 55 S. Ct. 794, 79 Law. Ed. 1530 correctly holds that the rule that the Federal question necessary to review of a state court's decision by the Supreme Court of the United States cannot be first raised after judgment by a petition for rehearing is subject to an exception where the question first arose from the unanticipated act of the state court in giving to a statute a new construction which threatened rights under the Constitution, so that the petition for rehearing presented the first opportunity for raising it.

The present case clearly falls within the exception provided for in the *Herndon* case.

The trial court upheld the validity of the corporate signatures. There was no basis for the petitioner to raise a Federal question at the trial court level. The trial court did not infringe the petitioner's constitutional rights, nor the rights of those citizens who resided in the contested land areas, so there was no basis on the appeal to the

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**Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394
Trenton v. New Jersey, 262 U.S. 182
William v. Mayor of Baltimore, 289 U.S. 36

Wisconsin Supreme Court to raise a constitutional question. It was not until the state supreme court rendered its decision that the discriminatory act complained of occurred—namely, the decision itself. The petition for rehearing, therefore, presented the first opportunity for petitioner to raise the Federal question.

The issue was raised and argued at length in the brief of the Greater Brown Deer Citizens Committee, filed *amicus curiae*. The issue and the argument set forth in that brief were formally adopted by the petitioner, Village of Brown Deer, in its brief in support of motion for rehearing. (See "Appendix B", page 34, this petition.)

The Supreme Court of Wisconsin did in fact consider the question, notwithstanding a written opinion was not issued following the disposition of the motion for rehearing. A motion for stay and for supersedeas was made by petitioner in the Wisconsin Supreme Court. Oral argument was heard by the court on Friday, June 8, 1962. In the last paragraph on page 13 of the City of Milwaukee's statement in opposition to petitioner's application for stay addressed to the Hon. Tom C. Clark, Associate Justice, counsel for the City of Milwaukee purport to report what transpired on the oral argument. While the tenor and implications of counsel's argument are incorrect, it is clear therefrom that the merits of the present constitutional issues were argued to the Wisconsin Supreme Court on June 8, 1962, in urging to the court that there was a substantial federal question and that this court probably would take jurisdiction. The court divided 5 to 2 in denying petitioner's motion for stay; and then divided 4 to 3 on petitioner's motion that the record be retained for 10 days to permit petitioner to apply to this court for stay. Thus, we see, that in one instance 2 justices of the Wisconsin Supreme Court and in a second instance

3 justices of the Wisconsin Supreme Court recognized such merit in petitioner's claim of unconstitutionality that they voted in the manner stated.

REASONS FOR GRANTING WRIT

1. The inhibitions of the Fourteenth Amendment include all the departments of state government, the judicial as well as the political.

A constitutional mandate to maintain equality before the law and equal laws rests upon the judicial department of government with as much force as upon the other departments. 12 Amer. Jur. Sec. 473, p. 137.

To the extent that the present case involves infringement of the constitutional rights of the corporations whose corporate signatures were arbitrarily and unreasonably struck down, the rights of corporations are stated thus in 12 Am. Jur. 474 at page 138:

> "(The protective scope of the 14th Amendment) * * * forbids the legislature to select any person, natural or artificial, and impose discriminations not cast upon others similarly situated. *The fact that corporations are 'persons' within the meaning of this clause is so well settled as to be open to no question.*" (Emphasis and bracketed matter ours.)

2. The State Supreme Court of Wisconsin has decided a Federal question of substance not in accord with applicable decisions of this court.

In *Shelley v. Kraemer*, 334 U.S. 1, 92 Law. Ed. (Adv. 845) 68 S. Ct. 836, 3 A.L.R. (2d) 441, this court held that among the rights intended to be protected from discriminatory state action by the 14th Amendment are the

rights to acquire, enjoy, own and dispose of property. In that case, which involved the validity of restrictive covenants, this court struck down restrictions which infringed on such rights. While the restrictions there were grounded on color and race, this court treated the upholding of the restrictions by a state supreme court as "state action" inhibited by the 14th Amendment.

In the present case the right of the many persons involved to act in concert by signing a petition for annexation in fulfillment of their wishes and desires to annex to Brown Deer is equally as important to them as the right to "acquire, enjoy, own and dispose of property" was to the persons against whom discrimination was practiced in the *Shelley* case. The reasons for the discrimination may differ in the two cases, but the constitutional infringement and impact upon property rights is the same. The signers of the petitions have suffered such impairment of their constitutional rights as to arouse the support of the minority of the Wisconsin Supreme Court, which, through Justice George R. Currie as their spokesman, characterized the majority decision in these words:

> "I deem the result of this holding to be a serious miscarriage of justice."

The Wisconsin Supreme Court's decision (majority opinion) in this case is completely out of harmony with the countless decisions of this court condemning arbitrary, discriminatory and unreasonable action with results, as here, in a deprivation of property without due process of law, and in a denial of the equal protection of the laws.

3. **If not reversed, the decision sought to be reviewed will cause great uncertainty, inconvenience and confusion in the conduct of the affairs of private business corporations, particularly in their dealings with governmental entities.**

The holding of the majority opinion is a denial that any apparent authority at all can exist in a corporate officer with respect to a political act—in this case the execution on behalf of the corporation of a petition for annexation. There is no precedent in Wisconsin or elsewhere for a distinction between political and other corporate acts with respect to the apparent authority of a corporate officer.

Such a decision as this is not to be regarded as harmless because narrow and restricted in its scope and application.

As so aptly stated by the Wisconsin Supreme Court in *St. Clair v. Rutledge*, 115 Wis. 583, 589-90:

> "As has often been said, intolerable mischief would result from requiring every person, at his peril, in dealing with the president of a corporation in a matter outside the scope of his duties as such, to first examine its records."

Corporations today are frequently in contact with governmental bodies and if official action by the board of directors with or without a meeting, must be had with respect to each and every act of a corporate officer which might be considered related to a political determination, then great inconvenience, uncertainty and confusion are inevitably to be the result. If the signing of an annexation petition is a "political" act, then what is to be the decision with respect to petitions asking for the open-

ing or closing of streets or alleys; petitions for the installation of water and sewer mains; petitions protesting against tax assessments; appeals from an assessor's determination to the Board of Review; elections whether to pay property tax in a lump sum or in installments; elections to use a fiscal year or a calendar year for income tax purposes; decisions to oppose the installation of public improvements; elections to dedicate property for public use; decisions to accept jurisdictional offers in eminent domain proceedings; decisions to participate in and contribute to governmental or quasi-governmental charitable and improvement programs; and contract negotiations between corporate officers and government officials with respect to public works, supply of equipment and materials, etc. What is to be the status, vis-a-vis attack by third parties, on competitive bids for public work signed by officers of corporate contractors and filed with municipal bodies? The certificate of the corporate secretary as to authorization of the officer can no longer be relied upon! In the case at bar two of the corporations involved actually submitted to the Village of Brown Deer copies of purported resolutions authorizing the President to sign the annexation petitions. These documents were certified by the corporate secretaries and bore the corporate seals, but were not in fact adopted by the boards of directors.

Certainly such political matters as listed above are no more important, and usually less important, than the average run of so-called business decisions made from day to day by any corporate officer. Such decisions are in the ordinary course of business, within the power of the board of directors, and are within the apparent authority available to a corporate officer under general law and previous decisions of the Wisconsin Supreme Court.

Recent decisions in courts in other jurisdictions with respect to the apparent authority of an officer to execute an annexation petition draw no such distinction as is drawn in the majority opinion in the present case.*

4. The precedent cited and relied upon by the Wisconsin Supreme Court has been grossly misconstrued and misapplied.

The assumption made by the Wisconsin Supreme Court in the majority opinion that the joinder in an annexation petition of a corporation is a "political act" so unusual as to be *akin to an act disposing of corporate assets* is arbitrary, unreasonable, and unwarranted. Upon simple reflection it is clear that the signing of an annexation petition which results in a substitution of one municipal government for another, involves no more (and probably much less) consideration than a corporate decision to physically move its place of business from one municipality to another.

The Wisconsin Supreme Court's reference to the case of *DeBauche v. Green Bay,* 227 Wis. 148, 277 N.W. 147 explains the source of the discriminatory treatment of the signers of the annexation petition.

DeBauche says that an *elector* wishing to be counted as supporting an annexation must personally sign a petition *in his own hand* unless he is unable to write, in which event alternative provision is made. This conclusion was reached by reason of Section 370.01(19) Stats. Stating that the term "elector" is descriptive of a citizen having certain constitutional and statutory qualifications, the court evaluated the status of "elector" as though it were

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Gorman v. City of Phoenix, 76 Ariz. 35, 258 P. (2d) 424 (1953)
McCune v. City of Phoenix, 83 Ariz. 98, 317 P. (2d) 537 (1957)

a public office (which it is not), and then buttressed its conclusion by citing various cases in which the signatures of public officers acting for and on behalf of the government were required to be signed by the individual official and not by an agent. At page 152 of the opinion the court said:

> "It may, however, be said that *Mericle v. Mulks* still stands as authority for the proposition that where the legislature requires the signature of one who *acts in a governmental capacity*, a written signature is required, and the construction statute (sec. 370.01(19) applies." (Emphasis added).

In the *DeBauche* case an *individual's* signature, not an authorized *corporate* signature was in issue.

In the *DeBauche* case the individual signature was that of an *elector*, as contrasted to the signature of a *corporate property owner* in the present case.

The *DeBauche* case involved application of Sec. 370.01 (19) Stats., a construction statute, which statute is not involved here.

The cases relied on in support of the *DeBauche* decision involved individual signatures to documents *as official acts of a government officer or agency*, whereas none of the corporate signers in the present case were acting for or on behalf of any government or agency of government.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Harold H. Fuhrman *(Signed)*

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APPENDIX A

(The following is the opinion of the Wisconsin Supreme Court reported in 16 Wis. (2d) at page 206, 114 N.W. (2d) 493. Formal parts omitted.)

APPEALS from a judgment of the circuit court for Milwaukee County: William I. O'Neill, Circuit Judge.

Affirmed in part: reversed in part.

This is an action for a declaratory judgment commenced on March 15, 1956, by the Village of Brown Deer against the City of Milwaukee and the Town of Granville. Prior to the events which precipitated this lawsuit, Granville was an unincorporated area of 22½ square miles located in Milwaukee county. In 1956, Brown Deer adopted five ordinances purporting to annex five different territories in Granville. Milwaukee, in 1956, adopted an ordinance purporting to annex territory in Granville, a part of which was included in one of the Brown Deer annexations. During that same year Milwaukee and Granville adopted consolidation ordinances which were subsequently approved at a referendum. Thereafter, Milwaukee asserted jurisdiction over all of Granville. Originally, Brown Deer sought a declaratory judgment which requested a determination that its five annexation ordinances were valid, that Milwaukee's annexation ordinance was invalid, and that Milwaukee's and Granville's consolidation ordinances were invalid.

In the first of the prior appeals this court determined that Brown Deer's annexations of territories in Granville took precedence over Milwaukee's consolidation with Granville. Thus, if Brown Deer's annexation ordinances were valid, then the territories involved would become a

part of Brown Deer. *Brown Deer v. Milwaukee* (1956), 274 Wis. 50, 79 N.W. (2d) 441, 86 N.W. (2d) 487.

Subsequent to the decision of this court on the second appeal, the matter finally proceeded to trial. Brown Deer sought to establish the validity of its five annexation ordinances and the invalidity of annexation ordinance adopted by the City of Milwaukee. The ordinances in issue are:

1. Brown Deer
   - No. 31—Corrigan Territory—10½ sq. mi.
   - No. 35—Brown Deer Park Territory—¾ sq. mi.
   - No. 53—Laun Territory—¼ sq. mi.
   - No. 32—Tripoli Territory—¼ sq. mi.
   - No. 34—Johnson Territory—4½ sq. mi.

2. Milwaukee
   - No. 631—Schroedel-West Territory—1 sq. mi.

The trial court determined that Brown Deer's ordinances nos. 32 and 34 were valid, but that nos. 31, 35 and 53 were invalid; and that Milwaukee's ordinance No. 631 was invalid. A judgment was entered on September 25, 1959. Brown Deer is appealing from that portion of the judgment which determines that three of its annexation ordinances are invalid, and Milwaukee has moved to review certain matters involved in such appeal. Milwaukee is cross-appealing from that portion of the judgment which upholds the validity of the two Brown Deer annexation ordinances, and which held invalid the Milwaukee annexation ordinance. Brown Deer has moved to review certain questions involved in the appeal taken by the City of Milwaukee.

Further facts will be stated in the opinion.

GORDON, J. All of the six annexations involved here were prosecuted under sec. 62.07 (1) (a), Stats. 1955. This statute provided in part that:

> "(1) *Annexation procedure.* Territory adjacent to any city may be annexed to such city in the manner following:
>
> (a) A petition therefor shall be presented to the council 1. signed by a majority of the electors in such adjacent territory and by the owners of one-half of the real estate within the limits of the territory proposed to be annexed; or 2. if no electors reside in the said adjacent territory signed by the owners of one-half of taxable property therein according to the last tax roll, or 3. by a majority of the electors and the owners of one-half of the real estate in assessed value; provided, that no petition for annexation shall be valid unless at least 10 days and not more than 20 days before any such petition is caused to be circulated, a notice shall be posted in at least 8 public places in the municipality."

Most of the issues concern whether the petition for annexation was signed "by a majority of the electors and the owners of one-half of the real estate in assessed value."

Each annexation ordinance will be discussed separately.

1. The Corrigan Annexation

The total assessed value of real estate in the Corrigan territory was $3,863,796, so that signatures of the owners of at least $1,391,898 of assessed value would be required for a valid petition. However, the trial court found that the petition contained the signatures of the owners of only $1,922,775 of assessed value, and thus there was a deficiency of 9,123. For this reason the annexation ordinance was held invalid by the trial court.

There are four principal issues raised upon the challenge to this annexation:

1. Whether the signature on the petition made on behalf of the Evert Container Corporation was properly authorized;

2. Whether the interest of Mary Cudahy Keogh, the owner of a remainder interest in real estate devised to her by her father, John Cudahy, with an assessed value of $30,297.75 was represented on the annexation petition by a sufficient signature;

3. Whether the signature of Mr. and Mrs. Mulholland on the petition was sufficient to commit a tract with an assessed value of $18,800 in favor of the annexation; and

4. Whether real estate owned by two railroads and an electric power company within the area in question should have been added to the total assessed value of real estate in the Corrigan area.

We conclude that the assessed valuation of the Evert Container Corporation, in the sum of $231,375, was improperly included in the computation of the total assessed value for which owners had signed on the annexation petition. No determination of any of the other issues, or any combination of such issues, in favor of Brown Deer, could alter the result of invalidation which attends our conclusion that the assessed value of the real estate of the Evert Container Corporation was improperly included on the annexation petition. Accordingly, we do not reach the other issues stated above.

The Evert Container Corporation has an eleven member board of directors. Charles Evert is president of the corporation, the majority stockholder and a member of the board of directors. Although he discussed the question of his signing the petition with a majority of the

members of the board of directors before he actually signed, the evidence is clear that Mr. Evert purported to sign on behalf of the corporation without obtaining either formal authorization from the board of directors or informal authorization as permitted under sec. 180.91, Stats.

Brown Deer contends that Milwaukee has no standing to challenge the authority of the president, Mr. Evert, to sign the petition on behalf of the corporation. As a general rule, if a corporation does not raise the objection that an officer lacked authority to do an act on behalf of the corporation, such objection may not be raised by a third person. 2 Fletcher, Cyclopedia Corporations, p. 523, sec. 490.

However, we believe that when a corporation purports to perform a political act, as opposed to a business act, other interested parties may be heard to challenge the validity thereof. Milwaukee is a vitally interested third party. Milwaukee has adopted a valid ordinance consolidating Granville; Brown Deer has adopted an ordinance purporting to annex territory in Granville. Such ordinance takes precedence over Milwaukee's consolidation.

We conclude that an interested municipality may raise the question of the lack of authority of a person purporting to sign an annexation petition on behalf of a corporation. Certainly Milwaukee could challenge the legal title of a person who signed an annexation petition as an owner of real estate. We see no difference in principle.

Sec. 180.30, Stats. 1955, provides:

> "The business and affairs of a corporation shall be managed by a Board of Directors. . . ."

Sec. 180.91, Stats. 1955, provides as follows:

> "Any action required by the articles of incorporation or by-laws of any corporation or any pro-

> vision of law to be taken at a meeting or any other action which may be taken at a meeting, may be taken without a meeting if a consent in writing setting forth the action so taken shall be signed by all of the shareholders, subscribers, directors or members of a committee thereof entitled to vote with respect to the subject matter thereof. Such consent shall have the same force and effect as a unanimous vote, and may be stated as such in any articles or document filed with the secretary of state under this chapter."

Sec. 180.91 was adopted in order to permit informal action by the board of directors. Corporations owe their existence to the statutes. Those who would enjoy the benefits that attend the corporate form of operation are obliged to conduct their affairs in accordance with the laws which authorize them. In 2 Fletcher, Cyclopedia Corporations, Sec. 392, p. 227 it is stated:

> "By the overwhelming weight of authority, when the power to do particular acts, or general authority to manage the affairs of the corporation, is vested in the directors or trustees, it is vested in them, not individually, but as a board, and, as a general rule, they can act so as to bind the corporation only when they act as a board and at a legal meeting."

The legislature having specified the means whereby corporations could function informally, it becomes incumbent upon the courts to enforce such legislative pronouncements. The legislature has said that the corporation could act informally, without a meeting, by obtaining the consent in writing of all the Directors. In our opinion, this pronouncement has pre-empted the field and prohibits corporations from acting informally without complying with sec. 180.91, Stats.

One of those who helped draft the Wisconsin Business Corporation Law, Dean George Young, has discussed this section in 1952 Wis. L. Rev. 5, and he says, at p. 19:

> "In addition, informal action may be taken without any meeting under section 180.91 by either directors or shareholders upon the unanimous written consent of all entitled to vote upon the subject of the action taken. Permitting corporate action based solely upon written assent, of course, sacrifices whatever wisdom there may be in requiring that decisions be made only after face to face discussion, but the advantage of flexibility probably outweighs any disadvantage. In any event, we all know that in fact many corporate meetings are held without the requisite formalities and the waivers and minutes are later prepared *ex post facto* to show compliance with the law. Such subterfuges should no longer be excusable under the new provision."

The presence of apparent authority and estoppel which might prevent the application of this rule in matters which flow in the normal course of business cannot apply where the action of the directors relates to a political determination and is outside of the ordinary course of normal business operations. In *DeBauche v. Green Bay* (1938) 227 Wis. 148, 153, 277 N.W. 147, the court stated that when an elector signed an annexation petition he was "discharging his duty in shaping and influencing this particular affair of government." The signing of a petition which would change the local government under which the corporation functions is more closely analogous to such unusual acts of the corporation as the disposition of its assets, as opposed to acts in the ordinary course of business. In deciding whether to sign an annexation petition, we believe it is clear that the corporation may not validly act in an informal manner unless it be in compli-

ance with the statutes. 2 Fletcher, Cyclopedia Corporations, p. 664, sec. 592.

There can be no doubt as to the rule in Wisconsin in view of the enactment of sec. 180.91 by the Wisconsin legislature. Fletcher also makes the following statement in his treatise at sec. 396 with respect to the effect of a statute permitting informal corporation action:

> "Of course, a statute may authorize particular acts to be done by the directors acting otherwise than as a board and at a formal meeting. But where it is claimed that the statutes of the state permit the corporation to dispense with this eminently wise and just rule, the construction will be strictly against any such contention."

The fact (1) that Mr. Evert owned 51 per cent of the stock of the corporation, or (2) that he may have been accustomed to resolving the problems of the corporation as a sole owner, or (3) that the Board of Directors met infrequently, or (4) that the corporation subsequently ratified his act do not derogate from the clear mandate of the statute.

The annexation petition must be valid as of the time it is submitted to the city council. *Blooming Grove v. Madison* (1960), 9 Wis. (2d) 443, 101 N.W. (2d) 809. Accordingly, ratification is of no avail.

2. *The Brown Deer Park Annexation*

The trial court held this ordinance to be invalid because the description of the territory was incorrect. The misdescription involved a strip of land which belonged to another incorporated municipality, the Village of River Hills. In view of our conclusion regarding the legal insufficiency of the corporate signature of Manu-

facturers Products, Inc., we do not reach the question of the inaccurate description.

The total assessed value of the real estate within the Brown Deer Park territory was $118,275. Including the $21,500 of assessed value owned by Manufacturers Products, Inc., the trial court found that $69,308 or over one-half of the total assessed value was represented on the petition. If the signature of this corporation is excluded, the petition would be insufficient and the ordinance invalid.

3. The Laun Annexation

The trial court held that this ordinance was invalid because an insufficient number of electors signed the petition. Two separate problems are raised in connection with this annexation petition:

(a) whether the total number of electors should include eleven persons who qualified as electors but had not registered to vote.

(b) whether six persons who signed the petition under the heading "owner" but not under the heading of "elector" could also be counted in the latter capacity.

The trial judge held that the eleven non-registered electors qualified as electors but that none of the six electors who signed only as an "owner" could also be counted as an "elector."

Sec. 62.07(1)(a), Stats., required the signatures of "a majority of the electors in such adjacent territory." Sec. 6.01, Stats., sets forth the qualifications for electors; registration is not one of the qualifications. The relevant statutes are unambiguous and simply do not require an elector to be registered; we are unable to restrict the word "elector" by adding the requirement that he be registered

to vote. We are unanimous in our conclusion that the trial court properly refrained from excluding the non-registered persons who otherwise qualified as electors.

The members of this court are equally divided in regard to the question whether those who signed as "owners" may also be counted as "electors" even though they signed in the former capacity only. Three of the justices (Mr. Justice Currie, Mr. Justice Fairchild and Mr. Justice Hallows) believe that a single signature on the petition is adequate to commit the signer to support the petition in both capacities if in fact the signer is both an owner and an elector. Three other justices (Mr. Chief Justice Broadfoot, Mr. Justice Brown and the writer) believe that each petitioner had a right to choose the form of classification with which he desired to be identified in the petition, and that when a petitioner signs only as an "owner" the court cannot infer the intent of such petitioner also to sign as an "elector."

Under the rule that an equally divided court results in affirmance of the court below, we reach the result that the Laun territory ordinance is invalid. *Hauenah v. Milwaukee E. R. & L. Co.* (1908), 136 Wis. 300, 116 N.W. 843; *Jacobs v. Queens Ins. Co.* (1905), 123 Wis. 608, 612, 101 N.W. 1090.

4. The Tripoli Annexation

The total assessed value of real estate in this territory was $169,800, of which $149,200 was owned by the Tripoli Golf Club. The trial court found that the signature on the petition entered on behalf of the golf club was sufficient. Because more than one-half of the necessary ownership was represented on the petition, the ordinance was held valid. We agree.

The golf club's president signed the petition as follows: "George C. Kroening Pres. Tripoli Golf Club 2/6/56." In our opinion, the trial judge correctly ruled that this signature reflected a corporate act. It strains reason to hold that this is only the signature of an individual, Mr. Kroening, and that the words "Pres. Tripoli Golf Club" serve only to identify him.

There was no proof presented to show that the corporation's signature was unauthorized and, in the absence of such proof, the signature stands unimpeached.

5. The Johnson Annexation

The assessed value of the real estate in the Johnson territory was $2,960,011. The trial court found that the owners of assessed value in the sum of $1,598,535 had signed the petition for annexation. This was over one-half of the total and included $210,400 of assessed value of the Good Hope Investment Co. The ordinance was held invalid.

The petition was signed on behalf of the Good Hope Investment Co. by its president, Ben Lewenauer. The record shows that he signed without either formal authorization by the board of directors or informal authorization by the directors permitted under sec. 180.91, Stats. For the reasons presented in our consideration of the Corrigan annexation, the corporate signature was ineffective. This reduces the assessed value represented upon the petition to under one-half. The ordinance based thereon is invalid.

6. The Schroedel-West Annexation

The city of Milwaukee adopted an ordinance purporting to annex a portion of Granville referred to as the Schroedel-West Territory. The Village of Brown Deer

disputes the validity of this ordinance and raises three objections:

a) The city has failed to prosecute the annexation within a reasonable time.

b) The posting of the notices of intention to circulate the petition of annexation was not in eight public places as required by statutes.

c) The annexation was not prosecuted in good faith because, during the pendency of this annexation, the city initiated and completed another annexation which included a portion of the same territory involved in the Schroedel-West annexation.

The trial judge held this ordinance invalid on the grounds that the notices were not posted in compliance with sec. 62.07(1)(a), Stats. We have concluded that the ordinance is invalid because of Milwaukee's failure to prosecute it within a reasonable time and, therefore, we do not reach the other questions referred to above.

The annexation proceedings were initiated by the posting of notices on January 25, 1955. One year and 26 days later, on February 21, 1956, the annexation ordinance was adopted. We note that the territory involved consisted of only 1.025 square miles and contained only 70 electors.

In the case of *In re Village of Brown Deer* (1954), 267 Wis. 481, 483-4, 66 N.W. (2d) 333, this court stated:

> "This court held in the *Walsh Case, supra*, in effect, that annexation proceedings must be conducted with reasonable dispatch and completed within a reasonable time. In the absence of legislation fixing a maximum time for the completion of annexation proceedings we cannot fix an arbitrary time therefor, or we would be legislating. We can and do say, however, that annexation proceedings once commenced must be conducted and completed within a time that

is reasonable in view of all the circumstances. The only legislative expression upon the matter since the decision in the *Walsh Case* is that the statute was amended to require that the circulation of petitions for annexation must be commenced within twenty days after the date of posting rather than forty-five days as permitted prior to the amendment. This is an indication at least that the legislature favors a prompt conclusion of annexation proceedings."

In *Brown Deer v. Milwaukee* (1956), 274 Wis. 50, 64, 79 N.W. (2d) 340, the following appears:

"We hold that this annexation, if otherwise valid and if pressed in good faith and completed within a reasonable time, will be effective as an annexation to Brown Deer and withdrawn from the consolidation."

We are persuaded that the City of Milwaukee failed to pursue the Schroedel-West annexation within a reasonable time, and the ordinance must be declared invalid.

By the Court—Those portions of the judgment adjudging as invalid the Corrigan annexation (Ord. No. 31 of the Village of Brown Deer), the Brown Deer Park annexation (Ord. No. 35 of the Village of Brown Deer), the Laun annexation (Ord. No. 53 of the Village of Brown Deer), and the Schroedel-West annexation (Ord. No. 631 of the City of Milwaukee) are affirmed. That portion of the judgment adjudging as valid the Tripoli annexation (Ord. No. 34 of the Village of Brown Deer) is affirmed. No costs will be allowed upon this appeal.

CURRIE, J. (dissenting in part) I respectfully dissent from the holding of the majority that a third party may question the binding effect upon a corporation of a written instrument executed by its president in the corporate name, be it a contract, or a petition addressed to

some public body. Furthermore, as applied to the facts relating to the signing of the annexation petitions by the two corporations in question, Evert Container Corporation and Good Hope Investment Company, I deem the result of this holding to be a serious miscarriage of justice.

Charles Evert, who subscribed the Corrigan tract annexation petition in behalf of the Evert Container Corporation, is the president and majority stockholder of the corporation.

Some of the directors resided outside of Wisconsin and the board of directors and stockholders customarily held only an annual meeting. At this annual meeting of stockholders they customarily ratified all acts of the officers and directors. Hence it is clear that Evert Container Corporation established a pattern of conduct which, at least by implication, delegated broad power to the president and clothed him with the apparent authority to represent and bind the corporation in all of its affairs and transactions between annual meetings. There was no evidence that the directors or stockholders ever refused to ratify any act performed by Evert as president during the yearly intervals between meetings. Under rather similar facts in *McElroy vs. Minnesota Parcheron Horam Co.* (1897), 96 Wis. 317, 71 N.W. 652, this court held that even the corporation was estopped to deny its president's authority to act in a particular matter.

The facts with respect to the Good Hope Investment Company's signature to the Johnson tract annexation petition are even stronger in favor of barring Milwaukee's right to challenge such signature. This corporation holds title to the Brynwood Country Club. President Lewenauer, who subscribed the petition in behalf of the corporation, discussed the matter informally with the other

four directors and obtained their oral approval. After the petition was filed, the directors held a meeting and formally ratified the signing. Attorney A. L. Skolnik, one of the five directors, testified that, for the most part, the directors transacted their business on an informal basis. Either president Lewenauer or secretary Ritz would telephone the other directors and inform them of any proposed corporation action. The directors would then express their opinion for or against the proposal, and the expression of the majority would govern.

From these facts it is apparent that each corporation desired to join in the annexation petitions. The general rule is clearly established that a third person may not raise the objection that a corporate officer lacked authority to do an act on behalf of the corporation, and thus void the corporate act, if no objection to the act was raised by the corporation. 2 Fletcher, Corporations, p. 523, sec. 490. The apparent theory behind this rule is that the failure of the corporation to object to an unauthorized act done in its behalf constitutes a tacit ratification, and that the policy of the law favors an interpretation which permits parties to rely on acts taken in behalf of corporations.

The majority attempts to distinguish between business acts and political acts of a corporation, and holds that the validity of the latter may be challenged by interested third parties. I see no basis for such a distinction. It would seem that the rationale of the general rule is just as applicable to so-called political acts as it is to strict business acts. Furthermore, what is a political act? Perhaps the instant action was motivated solely by tax considerations. This would make it as much a business decision as would be a decision on any other tax matter. Furthermore, a political act certainly cannot be defined

as any transaction in which a corporation deals with a governmental unit. For example, a corporation deals with government when it files written objections, pursuant to sec. 70.47(7) Stats., against the amount or valuation of the assessment made of its property. The filing of written objections is a condition precedent to its right to later bring court action for relief against the assessment. Would the municipality have the right in such court action to question the validity of the written objections, subscribed in the name of the corporation by its president, because the board of directors had not acted by formal resolution, at a regularly held board meeting, or by written informal action, in the manner authorized by sec. 180.91, Stats., to authorize the president to so act for the corporation? Following the reasoning of the majority opinion, the answer is "yes."

The majority attempts to justify its distinction by analogy. It states that Milwaukee could challenge the legal title of a person who signed an annexation petition as an owner of real estate, and thus should be able to challenge corporate ownership in a similar manner. This is certainly true. But the city presently can challenge the corporation's title to its real estate without attacking its validity to act.

Traditionally, the title of a corporation to property may be challenged by one without the corporate structure, while only the corporation or one acting in its behalf, has the right to challenge the authority of a managing officer to act for the corporation.

Statutory requirements that a corporation must follow a certain specified procedure, in authorizing action by its president, are made for the protection of the corporation and its shareholders, not as a sword to be used by a third party such as the city of Milwaukee in this action.

The majority concludes that the only way informal corporate action may legally be taken is by strict adherence to the provisions of Sec. 180.91 Stats. That statute reads in part that "Any action required ... . to be taken at a meeting, may be taken without a meeting if a consent in writing setting forth the *action so taken* shall be signed by all . ... entitled to vote with respect to the subject matter thereof." (Italics supplied.) A reasonable interpretation of this statutory language permits the construction that the consent may be signed after the action has been taken. Such construction is more in keeping with the practicalities of corporate action and with the realities of present corporation practice. Here each corporation subsequently ratified its president's act.

The basic decision really boils down to a policy determination. The majority decided in favor of a policy permitting interested third parties to attack the authority of corporate officers who have acted on behalf of their corporation, where the action has not been attacked by the corporation. It also decided that the only way such action can be taken is by strict adherence to the statutory formalities. The result of this decision is to impugn the ability of both third parties and members of a corporation to rely on acts of corporate officers. The social utility of definiteness of corporation action outweighs the utility of letting a city utilize every insignificant flaw to avoid an annexation. As technical as annexation proceedings now are, it would seem better to look to substance rather than strictly to form.

The better rule would be that an annexation petition, signed in behalf of a corporation landowner by its chief executive officer, is binding on the corporation, unless attacked by the corporation or its shareholders prior to the expiration of the 90 day limitation period provided by

Sec. 62.07(3), Stats., 1955. Therefore, I would hold that the city of Milwaukee has no right in this action to challenge the signatures to the petitions of Evert Container Corporation and Good Hope Investment Company. This would require that the trial court's judgment upholding the Johnson tract annexation be affirmed, and that the validity of the Corrigan tract annexation be determined on the other issues mentioned but not passed upon by the majority opinion.

I am authorized to state that Mr. Justice Hallows concurs in this opinion.

DIETRICH, J., took no part.

APPENDIX B

(The following is a direct quotation from the Brief of the Petitioner, Village of Brown Deer, filed in the Wisconsin Supreme Court in support of motion for rehearing. This is offered to show that petitioner adopted the Constitutional issue and argument thereon from the brief of the property owners who appeared therein *amicus curiae*.)

"IV.

"CONSTITUTIONAL ISSUES ARE ASSERTED

"Stewart G. Honeck, attorney for citizens and property owners of the annexation areas involved in this case, has drawn to our attention the infringement of constitutional rights of the property owners and citizens of the annexation areas involved, granted them by the 14th Amendment to the Constitution of the United States * * *. We hereby assert such constitutional rights in behalf of said property owners and citizens and the Village of Brown Deer and hereby adopt the contents of Mr. Honeck's brief as *amicus curiae* relative thereto."

APPENDIX C

ORDER AMENDING JUDGMENT IN CONFORMITY WITH SUPREME COURT MANDATE

(Formal parts omitted)

Whereas, a judgment was entered in the Circuit Court of Milwaukee County on the 2nd day of October, 1959, at 8:50 o'clock a.m., in the above entitled action; and

Whereas, thereafter appeals were perfected from said judgment to the Supreme Court of the State of Wisconsin; and

Whereas, the Supreme Court of the State of Wisconsin has affirmed in part and reversed in part the aforesaid judgment; and

Whereas, the mandate of the Supreme Court filed on April 3, 1962, provides as follows:

> "By the Court.—Those portions of the judgment adjudging as invalid the Corrigan annexation (Ordinance No. 31 of the village of Brown Deer), the Brown Deer Park annexation (Ordinance No. 35 of the village of Brown Deer), the Laun annexation (Ordinance No. 53 of the village of Brown Deer), and the Schroedel-West annexation (Ordinance No. 631 of the city of Milwaukee) are affirmed. That portion of the judgment adjudging as valid the Tripoli annexation (Ordinance No. 32 of the village of Brown Deer) is affirmed. That portion of the judgment adjudging as valid the Johnson annexation (Ordinance No. 34 of the village of Brown Deer) is reversed. No costs will be allowed upon this appeal."

Now, therefore, on motion of John J. Fleming, City Attorney, attorney for the above named City of Milwaukee,

It Is Ordered that that part of the aforesaid judgment of the Circuit Court of Milwaukee County providing: "Ordinance No. 34 of the Village of Brown Deer (Johnson annexation) adopted April 16, 1956, is valid," be and hereby is amended in accordance with the aforesaid mandate of the Supreme Court to provide and adjudge that "Ordinance No. 34 of the Village of Brown Deer (Johnson annexation) adopted April 16, 1956, is invalid." That in all other respects the said judgment of the Circuit Court of Milwaukee County remains in full force and effect.

That this order is in all respects pursuant to the aforesaid mandate of the Supreme Court of the State of Wisconsin.

Dated at Milwaukee, Wisconsin, this 15 day of June, 1962.

BY THE COURT,

William I. O'Neill (signed
Circuit Court Judge

APPENDIX D

AMENDED REMITTITUR

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Wisconsin, begun and held at the Capitol, in Madison, the seat of government of said State, on the Second Tuesday of August A.D., 1961, on the 90th day of the term, to-wit: On the 8th day of June A.D., 1962, Present, Chief Justice, Timothy Brown, George R. Currie, Thomas E. Fairchild, E. Harold Hallows, William H. Dieterich, Myron L. Gordon, and Horace W. Wilkie, Justices of said Court, the following proceedings were had, Inter Alia, to-wit:

Village of Brown Deer, a municipal corporation,
Appellant,

v.

City of Milwaukee, a municipal corporation, Town of Granville, a body corporate, Stanley J. Witkowski, City Clerk of the City of Milwaukee, Joseph F. Shaughnessy, Town Clerk of the Town of Granville,
Respondents.

Appeal from Circuit Court,
MILWAUKEE
County, State of Wisconsin.

And now at this day came the said appellant herein, by its attorneys, and moved the Court now here for a writ of supersedeas and for stay of execution pending appeal or certiorari to the United States Supreme Court, and also made oral application for the Court to retain the record for ten (10) days, which motions having been argued by Harold H. Fuhrman, Esq., and Stewart G. Honeck, Esq., for the said appellant, and by Harry G. Slater, Esq., Deputy City Attorney, and Marvin E. Klitsner, Esq., for the said respondents, and submitted, and the Court being now sufficiently advised of and con-

cerning the said motions, it is now here ordered and adjudged by this Court that the motion for a writ of supersedeas and for stay, be, and the same is hereby, denied, Justices Hallows and Dieterich dissenting; and that the oral application that the record be retained for ten days be, and the same is hereby denied, the Clerk to remit the record in the usual course, Justices Currie, Hallows and Dieterich dissenting.

STATE OF WISCONSIN } ss.
Supreme Court }

I, Gordon Samuelsen, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the Court in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, this 11th day of June, A.D., 1962.

Gordon Samuelsen
Clerk of the Supreme Court of the State of Wisconsin.